

# The new EU rules on horizontal cooperation agreements

EU Competition Law Briefing

# Part 1

# Agenda - Part 1



## **Overview**

Michael Bauer



## **Joint commercialisation / bidding consortia**

Henrik Nordling



## **Information exchange / clean teams**

Annemieke Hazelhoff



## **Joint production / network sharing**

Szabolcs Szendro



## **Joint buying**

Carlos Vergez

# Overview

Michael Bauer

# Overview

## What is it about?

- **Two Block Exemption Regulations**
  - Renewed
  - In force since 1 July, transition: 2 years
  - Covers
    - R&D
    - Specialisation and joint production
- **Horizontal Guidelines**
  - Renewed and amended (from 72 to 167 pages)
  - Only self-binding, but strong *de facto* legal effect
  - In force once published in OJ (July)
  - Covers
    - R&D / Specialisation and joint production
    - Joint purchasing / joint commercialization
    - Information exchange
    - Standardisation agreements / standard terms
    - Sustainability agreement

## What is new?

- Many new elements and clarifications
- Consideration of new case law and technical and political developments
- E.g.
  - New chapter on sustainability agreements
  - New section on mobile telecommunications infrastructure sharing agreements
  - Substantial revision of the information exchange chapter.
    - Information exchange in M&A context
    - Hub & Spoke scenarios
    - Data sharing
  - Agreements between parent and JV
  - Delineation between buyer cartel and joint buying
  - New section on bidding consortia

# Information exchange / clean teams

Annemieke Hazelhoff

# Information exchange

## What is it about?

- The extent to which direct or indirect exchange (or unilateral disclosure) of information falls within the scope of the cartel prohibition or can be exempted from it
  - When prohibited?
    - Exchange leading to a collusive outcome
    - Anti-competitive foreclosure
- How to deal with information exchange in the context of:
  - Collaboration agreements
  - Distribution agreements
  - M&A processes

## What is new?

- “Collusion by code”
  - The use of (price monitoring or behavioural coordination) algorithms
    - Offline and online treated the same
    - An algorithm remains under the firm’s control
- Measures to reduce competition risks
  - Use of ‘clean teams’ or trustees
    - In M&A process or management of data pool
  - Review agenda and minutes of (planned) meetings and have meetings/calls accompanied by a competition lawyer
- Self-assessment steps and guidance on liability

# Joint buying vs. buying cartels

Carlos Vérguez



# Joint buying v. Buyer cartels

## What is it about?

- Arrangements on **joint purchase of products** through: jointly controlled company; non-controlled company; **cooperative**; contractual arrangement or looser cooperation forms (**joint representative**)
- **Positive effects**: lower prices/transaction costs, more variety of and better quality products, better purchasing terms, avoid disruption of supply chain...
- **Negative effects**: increased prices, reduced output, product quality, variety or innovation, market allocation or foreclosure of other purchasers and ultimately → **a buyer cartel**
- **Safe harbour**: 15% in both the *purchasing* and (downstream) *selling* markets
  - requests to increase % disregarded by the EC

## What is new?

- Joint *negotiation* of purchase prices/other T&Cs
- **Distinction** with *buyer cartels*, which:
  - Coordinate buyers' individual market behaviour **or** negotiations with suppliers
  - First, fix purchase conditions and then, negotiate individually
  - Exchange sensitive info on individual purchasing *intentions*
- Factors that minimize risk of incurring in a buyer cartel:
  - Clarity with suppliers on negotiating *on behalf of* buyers
  - *Written* agreement defining scope/form/working of cooperation
- *Horizontal* (by object restriction) and *vertical* (not generally by object) **boycotts**. Sustainability justifications
- More complete guidance on the “by-effects” assessment
- Negotiation threats: no restriction by object, save for (i) stricter national rules on unilateral conduct or (ii) UTPs
- Retail alliances members active in different geographies

# Joint commercialisation / bidding consortia

Henrik Nordling

# Commercialisation Agreements / Bidding Consortia

## What is it about?

- Cooperation between competitors in selling, distribution or promotion of substitute products
- Can take many forms
- Main risk is coordination of important commercial parameters, and lead to price fixing or output limitation (object restrictions)
- Restrictive effects only likely if parties have some degree of market power
- Indispensability and objective necessity are key in the assessment

## What is new?

- New section on bidding consortia where two or more parties cooperate to submit a joint bid in tender
- Joint bidding will not restrict competition if it allows the parties involved to participate in a project that they would not be able to undertake individually
- Parties must assess whether they are realistically capable of completing the contract on their own
- A bidding consortia between parties that could submit individual tenders would still be acceptable if allows the parties to submit an offer that is more competitive than the offers they would have submitted alone
- New guidance also on joint commercialisation when it is objectively necessary in order to allow a party to enter a market that it could not have entered independently

# Joint production / network sharing

Szabolcs Szendro

# Joint production / Network sharing

## What is it about?

- **Horizontal production agreements:**
  - **Joint production:** production is carried out jointly, e.g. joint venture, joint team, joint organization
  - Horizontal **subcontracting:** the contractor and the subcontractor(s) are active on the same product market
  - **Specialisation:** One party ceases the production of certain products and purchases them from the other party – unilateral / reciprocal
- Production agreements may raise **various competition concerns**, e.g.:
  - Direct limitation of competition between the parties, e.g. limitation of output by the joint venture
  - Coordination of the parties' competitive behaviour as suppliers, e.g.: Commonality of costs, Exchanges of information
  - Anticompetitive foreclosure of third parties in spill-over markets, e.g. increasing the price of an intermediate product thereby increasing the costs of downstream rivals
- Production agreements may also lead to **efficiency gains**, e.g.:
  - Cost savings, improved product quality, increased product variety
  - **Sustainability-related efficiencies**, e.g. launching sustainable products, relocating production closer to sustainable energy sources

## What is new?

- New section on network sharing agreements ("**NSAs**") – agreements between mobile telco network operators to share the use of their network infrastructure
- Commission recognised that NSAs can provide **various benefits** in terms of cost reductions and improvements in quality and choice
- In principle, the Commission considers that **NSAs do not restrict competition by object** (unless they serve as a tool to engage in a cartel)
- Instead, NSAs always require a **case-by-case assessment** on the basis of relevant factors (e.g. type, depth, purpose and duration of sharing, scope of shared services, etc.)
- The HGLs also contain a set of **minimum conditions** which make it likely that the NSA will be considered permissible – e.g. operators control their own core network, maintain independent retail and wholesale operations, limited sensitive information exchange etc.
- The new section provides **useful guidance** for market players to conduct self-assessment concerning NSAs – e.g. active vs passive vs spectrum sharing
- It might contribute to **increased legal certainty** – with several still **open questions** though
- Therefore, it **grants NSAs with better options** and hence **enable a quicker deployment of new technologies**, e.g. 5G networks

## Part 2

# Agenda – Part 2



## **R&D agreements**

Rolf Hempel



## **Standard terms**

Nevena Radlova



## **Specialisation**

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## **Sustainability**

Michael Bauer



## **Standardisation**

Claire Vannini

# R&D agreements

Rolf Hempel



# R&D agreements

## What is it about?

- Joint R&D of competitors is beneficial for competition
- Far-reaching exemption of restrictions of competition by the R&D BER
- New R&D BER entered into force on 1 July 2023
- Transitory period until 30 June 2025 for agreements under old 2010 R&D BER

## What is new?

- No fundamental changes to the principles of the 2010 R&D BER
- Access to final R&D results remains key for the exemption
- Clarifications for market share calculation
- Simplification of the grace period
- New provision on withdrawal of the benefit of the BER if innovation competition is imperiled
- Extended commentary in the new Horizontal Guidelines

# Specialisation

Christian F. Haellmigk

# Specialisation

## What is it about?

- Positive effects of specialisation agreements
- Specialisation Block Exemption Regulation ("SBER") exempts
  - unilateral and reciprocal specialisation and joint production agreements
  - which have as object or effect a restriction of competition
  - if combined market shares of the participating undertakings do not exceed 20%
  - and which do not contain hardcore restrictions
- If agreement is not covered by SBER, assessment under Art. 101 (3) TFEU is necessary
- Revision process: undertakings, in particular SMEs, expected more legal certainty and more benefits from SBER

## What is new?

- Amendments new SBER
  - Expands the scope of specialisation agreements
    - unilateral agreements between two or more parties
  - Market share thresholds
    - clarification on handling, if agreement concerns intermediary products
    - more flexibility in market share calculation
    - simplified grace period
  - More power for the EC and NCAs
- Amendments new HGL

# Standardisation Agreements

Claire Vannini

# Standardisation Agreements

## What is it about?

- Standardisation agreements were **already caught by the former guidelines and subject to limited amendments**
- **Standardisation Agreement:**
  - setting standards for the product itself or interoperability purposes
  - Only agreements btw undertakings are caught (or through standardization bodies)
  - Sustainability agreements subject to specific rules
- **Markets affected:** product itself, technology (IPR), standard bodies, certification
- **Main Competition concerns:**
  - Information exchange
  - Limitation of innovation
  - Foreclosure effects (patent ambush)

## What is new?

- **No real novelties but enrichment and clarification**
- Presumption that agreements that fall outside the scope of article 101 § 1 if cumulative criteria are met:
  - Voluntary nature of the standard
  - Transparency of the decision-making process
  - Access on FRAND terms : more details in the news HGL
  - Management of IPR policy
    - Commitment to disclose IPR prior to the starting of the standardization process
    - Good faith disclosure
    - FRAND commitments
- If one of this criterion is missing : effect-based case by case analysis

# Standard Terms

Nevena Radlova

# Standard Terms

## What is it about?

- Standard conditions agreed between competitors for the sale or purchase of goods or services to third party customers or from third party suppliers
- Main effect and risks on the downstream market: limiting product choice and innovation; affecting the commercial conditions of the final product; foreclosing the market
- **Safe harbour:**
  - ✓ participation in the actual establishment of standard terms is unrestricted for the competitors in the relevant market
  - ✓ the established standard terms are non-binding and effectively accessible for anyone
  - ✓ No effect on price or on other important non-price parameters

## What is new?

- New standalone chapter, but no substantive changes in the guidance on how to assess agreements relating to standard terms
- Easier to read format

# Sustainability agreements

Michael Bauer



# Sustainability agreements

## What is it about?

- Agreements between competitors that pursue sustainability objectives
  - Broad application
    - Climate change, environment, health, human rights, living income, animal welfare
- Evaluation based on
  - General chapter
    - E.g. info exchange/benchmarking
  - Sustainability chapter
  - More favorable approach prevails
- Guidance for agreements **outside** 101
  - E.g. compliance with standards from international treaties
- Guidance for agreements **under** 101
- 210a CMO / guidelines

## What is new?

- If genuine sustainability goal usually not 'by object', but not for (e.g.)
  - Price fixing / Agreed passing on of costs
  - Lock-in agreements
- Safe harbor for sustainability standardisation agreements, e.g.
  - No significant price increase OR market share max 20%
- Individual exemption (101 para 3)
  - **Efficiencies**
    - Broad understanding, including social standards, e.g. living wages
    - Must be: objective, concrete, verifiable
  - **Indispensability**
    - Reasonably necessary to achieve goal – no other economically practicable option
    - Note: indispensability may change over time – regular monitoring advisable
  - **Fair share for consumers**
    - Only consumers of the products covered by the agreement
    - Individual use benefits: e.g. better products
    - Individual non-use benefits: e.g. less polluting production – consumer willing to pay for
    - Collective benefits: e.g. CO2 reduction – consumer not willing to pay for - consumers in the affected market must substantially overlap with beneficiaries

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